NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Abourached, 2007 NSCA 109

Date: 20071121
Docket: CAC 280889
Registry: Halifax

Between:

Nader Abourached

Appellant

v.

Her Majesty the Queen

Respondent

Judge(s):	MacDonald, C.J.N.S., Bateman and Fichaud, JJ.A.
Appeal Heard:	October 15, 2007, in Halifax, Nova Scotia
Held:	Appeal allowed in part and sentence altered per reasons for judgment of Fichaud, J.A.; MacDonald, C.J.N.S. and Bateman, J.A. concurring.
Counsel:	Donald Pressé, for the appellant Kenneth W.F. Fiske, Q.C., for the respondent

Reasons for judgment:

[1] Mr. Abourached was convicted of obstructing justice and assault causing bodily harm. He says that the trial judge's decision offended the *W.(D.)* criteria, the verdicts were unreasonable, and there were insufficient reasons under *R. v. Sheppard*.

Background

[2] Nader Abourached met Farah Al-Shaghay in April 2004. He was 20 and she was 22. They began a stormy relationship, the subject of these charges.

[3] In April 2005, Mr. Abourached was charged with assaulting Ms. Al-Shaghay. He was released on his undertaking to have no contact with her. Yet they continued to meet. In July 2005, Mr. Abourached was charged with uttering threats against Ms. Al-Shaghay and with breach of undertaking, and again was released on a further undertaking to have no contact with her. They continued relations until November 2005.

[4] In the early morning of August 25, 2005, the couple went to the apartment of Mr. Abourached's friend, Amer Al-Jbour, in Bedford. Mr. Abourached and Ms. Al-Shaghay entered the bedroom and were intimate. Mr. Abourached took two compromising photographs of Ms. Al-Shaghay. They quarrelled, and the argument became heated. The trial judge found that Mr. Abourached hit Ms. Al-Shaghay. After another acquaintance, Mohammad Shaath, arrived to calm them down, Ms. Al-Shaghay left.

[5] Three months later, Ms. Al-Shaghay went to the Halifax Police Station and gave a videotaped statement. She said Mr. Abourached had (1) assaulted her at the apartment on August 25, 2005; (2) threatened to send the nude photos to her family if she did not drop the charges from the incidents in April and July 2005; and (3) assaulted her again on August 28, 2005 by hitting and choking her and using a safety pin to scratch lettering on her arm.

[6] The police searched Mr. Abourached's residence. They seized a camera and computer containing the images of Ms. Al-Shaghay from August 25. The police

took photographs of Ms. Al-Shaghay. One photograph showed healed scratch marks on her forearm.

[7] In December 2005, the police arrested Mr. Abourached. He gave an interrogative statement. He admitted taking the photos. He denied assaulting Ms. Al-Shaghay on August 25 or 28. He said that Ms. Al-Shaghay initiated their trysts, she was sexually relentless, and their contacts continued after August 2005.

[8] Mr. Abourached was charged with: obstructing justice under s. 139(2) of the *Criminal Code*, for threatening to use the photographs unless Ms. Al-Shaghay dropped the earlier charges; two counts of assault causing bodily harm to Ms. Al-Shaghay under s. 267(b) of the *Code*, for August 25 and 28; two counts of breach of recognizance under s. 145(3) of the *Code*, for contacting her. Mr. Abourached pleaded not guilty. After election, he was tried in the Provincial Court before Judge Digby. The trial took four days between September 8, 2006 and February 20, 2007.

[9] The trial judge gave an oral decision on March 2, 2007, convicting Mr. Abourached of obstruction, the assault at the apartment on August 25 and the two breaches of recognizance. He acquitted Mr. Abourached of the second assault charge for August 28. Later I will discuss the trial judge's reasons and the evidence.

[10] On May 4, 2007 the trial judge sentenced Mr. Abourached to six months' incarceration for the obstruction and two years' suspended sentence with probation for the other three convictions.

[11] Mr. Abourached appeals his obstruction and assault convictions. His notice of appeal sought leave to appeal the sentence, but he later withdrew the sentence appeal.

Issues

[12] Mr. Abourached submits that the trial judge erred in law by (1) failing properly to apply *R. v. W.(D.)*, [1991] 1 S.C.R. 742, (2) making findings of fact inconsistent with or unsupported by the evidence, and by rendering inconsistent

verdicts, thereby rendering an unreasonable conviction, (3) giving inadequate reasons contrary to *R. v. Sheppard*, [2002] 1 S.C.R. 869.

First Issue - W.(D.)

[13] Mr. Abourached argues that the trial judge failed to properly implement Justice Cory's instructions in *W.(D.)*, p. 758, applicable when the accused has testified and credibility is in issue:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[14] Mr. Abourached's factum says that the trial judge "does not specifically reject the evidence of Abourached", which I take as a reference to Justice Cory's first and second instructions.

[15] In my view, the trial judge's decision satisfies *W.(D.)*.

[16] In *R. v. Lake*, 2005 NSCA 162, 240 N.S.R. (2d) 40 (C.A.), at ¶ 12-28, this court reviewed the application of the *W.(D.)* tests to a decision of a judge alone:

> [15] *W.(D.)* dealt with a jury charge. A judge alone is presumed to know the basic principles of law governing reasonable doubt which need not be recited mechanically in every decision. Her decision may operate within a flexible ambit. She need not quote phraseology from *W.(D.)*, follow the *W.(D.)* chronology or even cite *W.(D.)*. The question for the appeal court is whether, at the end of the day and upon consideration of the whole of the trial judge's decision, it is apparent that she did not apply the essential principles underlying the *W.(D.)* instruction. *R. v. Boucher*, 2005 SCC 72 at ¶ 29 and 59; *R. v. Minuskin* (2003), 181 C.C.C. (3d) 542 (O.C.A.), at ¶ 22; *R. v. Brown* (1994), 132 N.S.R. (2d) 224 (C.A.) at ¶ 17 and 19; *R. v. Maharaj* (2004), 186 C.C.C. (3d) 247 (O.C.A.) at ¶ 33, leave to appeal denied [2004] SCCA No. 340; *R. v. Saulnier*, 2005 NSCA 54

> at ¶ 17, 19, 35, 37; *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (O.C.A.) at p. 203; *R. v. Robicheau* (2001), 193 N.S.R. (2d) 42 (N.S.C.A.), at ¶ 27, per Roscoe, J.A. dissenting, adopted by the Supreme Court of Canada [2002] 2 S.C.R. 643; *R. v. Mah*, 2002 NSCA 99, at ¶ 41; *Chittick*, at ¶ 21; *R. v. Binnington*, 2005 NSCA 133, at ¶ 10.
>
> . . .
>
> [17] An implied answer to one of *W.(D.)*'s questions clearly is acceptable. In *R. v. Boucher*, 2005 SCC 72, at ¶ 29 and 59, the majority and dissenting judges agreed that, when a trial judge clearly rejects an accused's credibility, this not only answers *W.(D.)*'s first question but also may imply a negative answer to *W.(D.)*'s second question. To similar effect: *R. v. Smaaslet*, 2004 BCCA 432 at ¶ 8, 21; *R. v. Nelson*, [2004] O.J. No. 3103 (O.C.A.), at ¶ 19; *R. v. M.A.L*, 2005 BCCA 395 at ¶ 47-48.

In *Lake*, the court then considered the essential principles that underlie the *W.(D.)* instruction. First, the trial judge may err by discounting the accused's testimony just because he has believed the Crown witnesses. The accused has not really been disbelieved. He has been marginalised. Second, a verdict based on a choice of whom to believe may ignore the concept of reasonable doubt. The first principle underlies Justice Cory's first instruction. The second underlies the third instruction. Both principles underlie the second instruction.

[17] I will apply those principles here.

[18] On the obstruction charge, the trial judge said:

> . . . ***I don't, however, accept Mr. Abourached's explanation that this was a joke,*** given the fact that Mr. Abourached was harbouring an anger or a resentment towards Ms. Al-shaghay as a result of his belief that she had been involved with other men and that he intended to confront her over this issue. It was not a time for humour, nor can one logically expect that there would be any humour involved in such a situation. ***My view is that he took that picture because*** he well aware that she would not like such a picture taken and that ***it would*** give her an element -- and ***give him an element of control over her***, an element of control which would enable her to -- him to torture her emotionally by threatening to use these digital pictures in whatever way he saw fit. . . .

> Ms. Al-shaghay says that Mr. Abourached, in addition to doing -- threatening to expose her to shame and humiliation by showing the pictures in order to obtain responses to his questions regarding unfaithfulness, that he also said statements to -- or made statements to her to the effect that she should also see what she could do about getting the outstanding assault charges dropped. ***I have looked at the statement given to the police by Mr. Abourached, and I note in particular the questions and answers given on page 88 and the immediately preceding and following pages. I take Mr. Abourached's answers at that point to be acknowledgment that this would provide him a safety line because he didn't want to go to jail***, as he had previously, although in other pages, he denies that he ever made a statement to that effect to Ms. Al-shaghay. ***Having looked at Mr. Abourached's statement to the police and looking at the evidence of Ms. Al-shaghay, I am satisfied beyond a reasonable doubt that Mr. Abourached did say to Mr. -- to Ms. Al-shaghay that he wanted her to use -- to see what she could do about stopping the assault charges against him, using the threat of disseminating the pictures in order to motivate her to do so.*** . . .
>
> ***He also says that he knew that the police or the Crown would proceed with the charges regardless of what Ms. Al-shaghay wished. I don't find that latter point to be a particularly persuasive argument*** because he could make the threat and have two possible benefits. . . . Either the charges would be dropped or he could cause her emotional pain as payback for what he obviously suffered when he found out that she had possibly been unfaithful. I find Mr. Abourached guilty of the first count. [emphasis added]

[19] Unlike the trial decision in *Lake*, the decision here referred to Mr. Abourached's testimony and discounted it. After referring to Mr. Abourached's testimony and that of Ms. Al-Shaghay, the trial judge said he was satisfied beyond a reasonable doubt that Mr. Abourached attempted to persuade Ms. Al-Shaghay to drop the existing criminal charges by threatening to disseminate the photographs.

[20] With respect to the assault charge for August 25, the trial judge said:

> With respect to the second count of assault causing bodily harm, the evidence is clear that Ms. Al-shaghay and Mr. Abourached were together in the bedroom at the friend's apartment on Amin Street in Bedford. It's clear that the door was shut and they were having a heated argument. The noise was sufficiently loud from the room that one occupant called someone else who was a better friend to both of them to see if they could be calmed down. I'm satisfied that tempers on both sides were up between the two parties in the room. ***The Defence says that Mr. Abourached did not assault Ms. Shaghay*** and that there were no marks noticed on her by the other persons who were there that night. On the other hand, there is

> the evidence of Ms. Shaghay that she was struck a number of times, and as a result of that, she had bruises to her ear, the side of her face and her arm. ***The Defence called one witness who indicated that when he saw Ms. Shaghay at the library and looked at her face, she had no bruises.*** On the other hand, Ms. Shaghay had a friend who she showed the bruises to, and that friend described the bruises. ***Having looked at all of this***, I'm satisfied that the bruises would not necessarily have formed or been readily apparent to the other persons in the room on that particular night. It's clear that [Ms.] Shaghay was angry with - or Mr. Abourached was angry with Ms. Shaghay. ***I'm aware of the test in R. v. W.D.*** It's not a question of preferring one witness's testimony over another. I have to be satisfied beyond a reasonable doubt. Given the support for Ms. Al-shaghay's testimony given by her friend who saw the bruises, ***I'm satisfied beyond a reasonable doubt that Mr. Abourached assaulted Ms. Shaghay and caused bodily harm to her*** contrary to Section 267(b) of the Criminal Code, and I find Mr. Abourached guilty of that count. [emphasis added]

[21] The trial judge referred to Mr. Abourached's version, denying the assault, and rejected it. He referred to *W.(D.)* and said he was satisfied beyond a reasonable doubt that the assault was proven.

[22] The trial judge applied the essential principles underlying the *W.(D.)* instruction and, expressly or impliedly, addressed Justice Cory's three criteria. I would dismiss this ground of appeal.

[23] Mr. Abourached's factum, discussing *W.(D.)*, cites the "numerous internal inconsistencies in [Ms. Al-Shaghay's] evidence and conflicts with respect to other witnesses' testimony", and asks rhetorically "how can the learned trial judge not be left in a reasonable doubt with respect to guilt on these two counts?" In my view this argument is more appropriately addressed to Mr. Abourached's other ground of appeal that the verdict is unreasonable. The *W.(D.)* issue is whether the trial judge answered the questions posed by Justice Cory's model instructions. If the answers, express or implied, are apparent from the judge's decision, that satisfies *W.(D.)*. Mr. Abourached's submission that the trial judge erred in his assessment of the evidence, leading to those answers, invokes the verdict's reasonableness under s. 686(1)(a)(i) of the *Code*.

Second Issue - Unreasonable Verdict

[24] In *R. v. Beaudry*, [2007] 1 S.C.R. 190 Justice Charron (¶ 55-63), for four justices, reiterated the test for an unreasonable verdict from *R. v. Yebes*, [1987] 2 S.C.R. 168 and *R. v. Biniaris*, [2000] 1 S.C.R. 381 - whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. Justice Charron emphasized that the appeal court's task is to assess the verdict, not the process used to reach the verdict. She held that the trial judge's conviction was not unreasonable.

[25] In *Beaudry* Justice Fish, also for four justices (dissenting in the result), held that the trial judge's conviction was unreasonable. He disagreed with Justice Charron's statement of the test. He concluded (¶ 90-92) that the *Yebes* test was appropriate in an appeal from a jury's verdict, where the jury's reasons are concealed. But a judge's reasons may be examined to review the judge's evaluation of the evidence. Justice Fish said:

> [97] . . . No one should stand convicted on the strength of manifestly bad reasons -- reasons that are illogical on their face, or contrary to the evidence -- on the ground that another judge (who never did and never will try the case) could *but might not necessarily* have reached the same conclusion for *other reasons*. A verdict that was reached illogically or irrationally is hardly made reasonable by the fact that another judge could reasonably have convicted *or acquitted* the accused. I think it preferable by far, where there is evidence capable of supporting a conviction, to order a new trial so that a fresh and proper determination can be made by a real and not hypothetical "other judge". [S.C.C.'s emphasis]
>
> [98] I hasten to add that appellate courts, in determining whether a trial judge's verdict is unreasonable, cannot substitute their own view of the facts for that of the judge or intervene on the ground that the judge's reasons ought to have been more fully or more clearly expressed. That is beyond the purview of an appellate court: [citations omitted]. But where reasons do exist, a verdict cannot be reasonable within the meaning of s. 686(1)(a)(i) if it is made to rest on findings of fact that are demonstrably incompatible, as in this case, with evidence that is neither contradicted by other evidence nor rejected by the judge.

[26] In *Beaudry*, the ninth justice, Justice Binnie (¶ 77-79) agreed with Justice Fish's statement of the test:

> [79] . . . In the eyes of the litigants and the public, where the findings of facts essential to the verdict are "demonstrably incompatible" with evidence that is neither contradicted by other evidence nor rejected by the trial judge, such a

> verdict would lack legitimacy and would properly, I think, be treated as "unreasonable".

Justice Binnie (¶ 76, 80) disagreed with Justice Fish's application of this test and concurred with Justice Charron in the result, that the trial judge's decision was not unreasonable.

[27] In short, while Justice Charron spoke for the majority in the result, Justice Fish (dissenting in the result) spoke for the majority in his formulation of the process inquiry to determine whether a decision of a judge alone is unreasonable under s. 686(1)(a)(i) of the *Code*. See also, to this effect, *R. v. Hines*, [2007] N.S.J. No. 197, 2007 NSCA 56, at ¶ 4. I am aware that, since *Beaudry*, several courts have cited the reasons of Justice Charron, reiterating the *Yebes/Biniaris* test, to determine the reasonableness of a verdict by a judge alone: *Alcius v. R.*, [2007] J.Q. No. 1152 (C.A.), 2007 QCCA 216, at ¶ 99; *Y.M. v. R.*, [2007] J.Q. No. 10863 (C.A.) 2007 QCCA 1248; *R. v. Schoenthal*, [2007] S.J. No. 387 (C.A.), 2007 SKCA 80 at ¶ 7, 68-69; *R. v. Bell*, [2007] O.J. No. 1725 (C.A.), 2007 ONCA 320, at ¶ 15-17, leave to appeal denied [2007] S.C.C.A. No. 351. In my respectful view, however, the touch of Justice Binnie's concurring reasons establishes Justice Fish's statement as at least one of the effective standards.

[28] At the hearing, counsel for Mr. Abourached and for the Crown acknowledged that Justice Fish's formulation is the appropriate standard for this appeal.

[29] I will consider whether the findings essential to the decision are demonstrably incompatible with evidence that is neither contradicted by other evidence nor rejected by the trial judge. I will also consider the traditional *Yebes/Biniaris* test, preferred by Justice Charron in *Beaudry*, whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered.

[30] With respect to the obstruction charge, Ms. Al-Shaghay testified:

> . . . And then he said I have these pictures now.
>
> The Court: Who said?

A. Nader said I have these pictures now so drop the charges and I'll get rid of them.

Ms. Driscoll: What do you think he was referring to when he said "drop the charges"?

A. Because I had three previous charges pressed on him that were pending.

Q. So he said drop the charges and I'll get rid of the pictures, is that correct?

A. Yes.

Q. Did you give him a response to that comment?

A. I said I'll try, that I would try to do it.

Q. And why? What was your fear with the pictures?

A. He threatened to send them to my family and post them on the internet.

Q. And what was your fear if your family saw those pictures?

A. Well, I would be humiliated, and my family would more than likely have disowned me.

[31] The trial judge (quoted above ¶ 18) referred to this testimony, and also to p. 88 of Mr. Abourached's statement to the police, which says:

Det/Cst BOWERS:	You didn't do anything with them. Ya took the pictures and ya told her you were gonna use those pictures.
Mr. ABOURACHED:	Basically.
Det/Cst BOWERS:	Yeah. And why did ya tell her that? What did ya ...
Mr. ABOURACHED:	(*Speaking at the same time*) ... 'Cause ...

Det/Cst BOWERS:	... want her to do?
Mr. ABOURACHED:	‘Cause I had already went to jail because of her.
Det/Cst BOWERS:	Right.
Mr. ABOURACHED:	And I don’t wanna go to jail again.
Det/Cst BOWERS:	So ya told her you wanted her to drop the charges or you would show the pictures.
Mr. ABOURACHED:	Well she would drop them anyways.
Det/Cst BOWERS:	Yeah.
Mr. ABOURACHED:	Because ...
Det/Cst BOWERS:	But did you ask her to do that?
Mr. ABOURACHED:	She said she was gonna drop them anyways. This was ... *(Stutters)* ...
Det/Cst BOWERS:	(*Speaking at the same time*) ... Nader, you’re not answering ...
Mr. ABOURACHED:	This is my safe... This is ... That was my safe ...

[32] From this, the trial judge concluded:

> I have looked at the statement given to the police by Mr. Abourached, and I note in particular the questions and answers given on page 88 and the immediately preceding and following pages. I take Mr. Abourached’s answers at that point to be an acknowledgment that this would provide him a safety line because he didn’t want to go to jail, as he had previously, although in other pages he denies that he ever made a statement to that effect to Ms. Al-shaghay. Having looked at Mr. Abourached’s statement to the police and looking at the evidence of Ms. Al-shaghay, I am satisfied beyond a reasonable doubt that Mr. Abourached did say to Mr. - to Ms. Al-shaghay that he wanted her to use - to see what she could do about stopping the assault charges against him, using the threat of disseminating the pictures in order to motivate her to do so.

[33] The trial judge's finding is not demonstrably incompatible with other uncontradicted evidence. The other evidence, the denials from the defence, are contradicted by Ms. Al-Shaghay's testimony.

[34] Ms. Al-Shaghay's version is corroborated by a tenable interpretation of Mr. Abourached's police statement. A properly instructed jury, acting judicially, could reasonably have convicted Mr. Abourached of obstruction.

[35] Respecting the assault charge, Ms. Al-Shaghay testified about the events of August 25, 2005:

> Q. And did you say anything while the pictures were being taken?
>
> A. Not that I recall.
>
> Q. And what happened after that?
>
> A. He said are you going to tell me the truth now. And I just looked over at him and I said I don't know what you're talking about. And then he lunged on top of me and started to hit me in the face.
>
> Q. Prior to the pictures being taken, had you been arguing or getting along?
>
> A. We were getting along.
>
> Q. So when he said, "Are you going to tell me the truth now," do you know at that time what he meant by that?
>
> A. No.
>
> Q. You indicated he lunged on you and started hitting you in the face. Were you sitting or laying down?
>
> A. I was laying down.
>
> Q. And what was he hitting you with?
>
> A. With his hand.

Q. And was it opened or closed?

A. Open.

Q. And where on your body . . . you said your face. Do you recall if it was a particular side or where on your face it was?

A. It was mostly on the left side of my face.

. . .

Q. And did that occur in the bedroom or in the room with everyone else?

A. We went into another room.

Q. And who went into the other room?

A. Me and Nader at first.

Q. And what if anything was he saying to you?

A. I don't know word-by-word. He was just extremely upset and accusing me of being unfaithful and lying to him and being with other men.

Q. Was he doing anything or was he just speaking at that point?

A. He was speaking and hitting me.

Q. And what was his tone of voice?

A. Angry.

Q. And what was he hitting you with?

A. His hand, with an open hand.

Q. And where on your body?

A. He hit me in the face, and then he started to punch me in the arms. In the arm, sorry.

Q. When he hit you in the face, was his hand open or closed?

A. He had an open hand.

Q. And how hard was he hitting you?

A. Pretty hard.

Q. And you've indicated that he punched you in the arm. Was that with a closed fist or an open fist?

A. Closed fist.

Q. And how many times were you struck in the arm?

A. Six to eight times.

[36] Mr. Abourached points out that Messrs. Al-Jbour and Shaath did not notice any bruising on Ms. Al-Shaghay on August 25. To this, the trial judge said (above ¶ 20):

> I'm satisfied that the bruises would not necessarily have formed or been readily apparent to the other persons in the room on that particular night.

[37] Ms. Al-Shaghay testified that, within a day or two of this event, she showed the bruises on her ear and left shoulder to her acquaintance, Erin Little. Ms. Little testified that she saw bruising to the ear and to Ms. Al-Shaghay's right shoulder. The trial judge considered Ms. Little's evidence as corroboratory:

> On the other hand Ms. Shaghay had a friend who she showed the bruises to, and that friend described the bruises.

[38] Mr. Abourached points to some inconsistencies between Ms. Al-Shaghay's police statement and her testimony, and between Ms. Al-Shaghay's testimony and that of other witnesses. An example of the latter is Ms. Al-Shaghay's reference to a bruised left shoulder and Ms. Little's recollection of a bruised right shoulder.

[39] It was the trial judge's function to decide the basic issue of credibility. When Ms. Al-Shaghay and Mr. Abourached were alone in the room, did he hit her? She said he did. He denied it. The trial judge observed their testimony and demeanor and accepted her version. The witnesses testified over a year after the event, and their recollections were not immaculate. Despite some inconsistencies, Ms. Little's testimony essentially corroborated that there were bruises. The tangential inconsistencies cited by Mr. Abourached on this appeal, in Justice Binnie's words from *Beaudry* (¶ 80):

> . . . have neither the centrality to the verdict nor the incompatibility with the record sufficient to justify a reversal.

[40] Under Justice Fish's test in *Beaudry*, the assault conviction for the events of August 25 is not demonstrably incompatible with evidence that is "neither contradicted by other evidence nor rejected by the trial judge." It is incompatible with Mr. Abourached's testimony, but his testimony is contradicted by that of Ms. Al-Shaghay. Under the *Yebes/Biniaris* test, the conviction is a verdict that a properly instructed jury, acting judicially, could reasonably have rendered. My view is subject to the issue of possible inconsistency of verdicts, that I will discuss next.

[41] Mr. Abourached submits that his conviction for the assault on August 25 is inconsistent with his acquittal for the August 28 alleged assault, and this establishes the unreasonableness of his conviction. An appellant has a heavy onus to show an unreasonable conviction because of inconsistent verdicts. This is because, given the differing evidence for the two charges, the appellant usually will have difficulty showing that no properly instructed trier of fact, who considered that evidence, could reasonably have convicted: *R. v. Pittiman*, [2006] 1 S.C.R. 381 at ¶ 6,10; *R. v. Campbell* (L.A.) (2000), 184 N.S.R. (2d) 374 (C.A.) at ¶ 28; *R. v. McLaughlin* (1974), 15 C.C.C. (2d) 562 (O.C.A.) at p. 567; *R. v. Kruper*, [2007] A.J. No. 30 (C.A.) at ¶ 19. The question is not whether the unappealed acquittal is reasonable, but whether the appealed conviction is unreasonable. A difference in the evidence that may rationally distinguish the verdicts normally dispatches a submission that a conviction is unreasonable by inconsistency: *Pittiman*, at ¶ 6-15.

[42] With one exception that I will come to, the evidentiary underpinnings of the August 25 and 28 alleged assaults are mutually independent. The trial judge could

rationally conclude, from that evidence, that Mr. Abourached assaulted Ms. Al-Shaghay on the earlier day but not on the latter.

[43] In one respect, however, I am unable adequately to assess the consistency of the two assault verdicts in order to determine the reasonableness of the assault conviction. My difficulty does not arise from the trial judge's analysis of the evidence or his credibility findings *per se*. It arises from the trial judge's expressed reasons.

[44] There was a significant common feature of the two alleged assaults. In both cases, the marks left by the alleged assaults (bruises or scratches) were first noticed by a corroboratory witness, Ms. Little, to whom Ms. Al-Shaghay showed her injuries days after the event. So there was a common issue – whether those marks were caused by Ms. Al-Shaghay herself after the time of the alleged assaults.

[45] For the August 28 allegation, the trial judge acquitted, saying:

> Mr. Abourached has called evidence to indicate that on previous occasions, Ms. Al-Shaghay had done damage to her arms or had caused possible bruising to herself by banging her head against things. It would suggest that Ms. Al-Shaghay has some emotional issues and possibly a temper. Although it's probable that Mr. Abourached caused - placed the letters on Ms. Al-Shaghay's arm, there is a possibility that he did not and that it was created by Ms. Al-Shaghay as a means of retaliating against Mr. Abourached. Given that, I find Mr. Abourached not guilty of count 3.

[46] For the August 25 event, however, the trial judge convicted and said nothing about Ms. Al-Shaghay's propensity for retaliatory self harm. He said:

> The Defence says that Mr. Abourached did not assault Ms. Shaghay and that there were no marks noticed on her by the other persons who were there that night. On the other hand, there is the evidence of Ms. Shaghay that she was struck a number of times, and as a result of that, she had bruises to her ear, the side of her face and her arm. The Defence called one witness who indicated that when he saw Ms. Shaghay at the library and looked at her face, she had no bruises. On the other hand, Ms. Shaghay had a friend who she showed the bruises to, and that friend described the bruises. Having looked at all of this, I'm satisfied that the bruises would not necessarily have formed or been readily apparent to the other persons in the room on that particular night. It's clear that M[s]. Shaghay was angry with - or Mr. Abourached was angry with Ms. Shaghay. I'm aware of the test in *R. v.*

> *W.D.* It's not a question of preferring one witness's testimony over another. I have to be satisfied beyond a reasonable doubt. Given the support for Ms. Al-shaghay's testimony given by her friend who saw the bruises, I'm satisfied beyond a reasonable doubt that Mr. Abourached assaulted Ms. Shaghay and caused bodily harm to her contrary to Section 267(b) of the *Criminal Code*, and I find Mr. Abourached guilty of that count.

[47] Other than Ms. Al-Shaghay, no one in the apartment on August 25 attested to the assault. Mr. Abourached denied it. Messrs. Saath and Al-Jbour said that they heard arguing, but nothing to indicate an assault. Ms. Al-Shaghay said that Mr. Abourached continued the assault for a half hour while Mr. Saath was in the room, but Mr. Saath denied that. The witnesses did not see bruising on August 25. The only corroboratory evidence was Ms. Little's observation of bruises a day or two afterward. The trial judge cited Ms. Little's testimony (the "friend who she showed the bruises to") as a factor in his decision to believe Ms. Al-Shaghay.

[48] Had the trial judge not acquitted Mr. Abourached for the August 28 allegation because of Ms. Al-Shaghay's propensity for retaliatory self harm, this point might not be significant to an appeal from the August 25 assault conviction. Similarly, if the trial judge's reasons had cited a distinction to discount Ms. Al-Shaghay's propensity respecting the August 25 assault, this court's scope of review would be significantly limited. It is possible to overturn a verdict as unreasonable based on palpable and overriding error in the assessment of credibility: *R. v. Burke*, [1996] 1 S.C.R. 474; *R. v. Gagnon*, [2006] 1 S.C.R. 621 at ¶ 10, 20. But the trial judge's special advantages in assessment of the evidence and credibility demand substantial deference from the appeal court: *R. v. W.(R.)*, [1992] 2 S.C.R. 122, at pp. 131-2; *R. v. Clark*, [2005] 1 S.C.R. 6, at ¶ 9; *Gagnon*, *supra* at ¶ 10-11, 19-20; *R. v. R.D.*, [2006] 2 S.C.R. 610 adopting the dissenting reasons of Dutil, J.A., [2005] Q.J. No. 17811 (Q.C.A.) at ¶ 104-7.

[49] The critical difference here, from many cases where the appellant says credibility errors led to an unreasonable verdict, is that the trial judge acquitted Mr. Abourached for the August 28 charge because Ms. Al-Shaghay's propensity gave the trial judge a reasonable doubt. The trial judge lifted this factor from the bed of evidence and made it a deciding basis not to believe Ms. Al-Shaghay's accusation of assault on August 28. Given this, the trial judge at least should have addressed the point, if only to explain how he distinguished it, for the August 25 assault charge.

[50] In *Pittiman* Justice Charron for the Court said (¶ 8):

> On the other hand, when the evidence on one count is so wound up with the evidence on the other that it is not logically separable, inconsistent verdicts may be held to be unreasonable: eg, see *R. v. Tillekaratna* (1998), 124 C.C.C. (3d) 549 (Ont. C.A.)

Mr. Abourached has raised this as a ground of appeal.

[51] Unfortunately, the trial judge's reasons do not furnish all the resources needed for proper appellate review. The trial judge may have had a different intuitive view of Ms. Al-Shaghay's proclivity for self-induced retaliatory injury for the August 25 event than he did for August 28. Or he may have just neglected entirely to consider the point for the August 25 charge. From the reasons, I cannot tell which. Whether it is one or the other affects the Court of Appeal's analysis of the reasonableness of the August 25 assault conviction. The former would demand significantly more appellate deference to the trial judge's assessment than the latter. This handicap to the Court of Appeal's ability to assess the reasonableness of the assault conviction invokes the remaining ground of appeal concerning sufficiency of reasons.

Third Issue - Sufficiency of Reasons

[52] Mr. Abourached submits that the trial judge's reasons are insufficient for the obstruction and August 25 assault convictions.

[53] In *Sheppard*, Justice Binnie for the Court said:

> 24 In my opinion, the requirement of reasons is tied to their purpose and the purpose varies with the context. At the trial level, the reasons justify and explain the result. The losing party knows why he or she has lost. Informed consideration can be given to grounds for appeal. Interested members of the public can satisfy themselves that justice has been done, or not, as the case may be.
>
> 25 The issue before us presupposes that the decision has been appealed. In that context the purpose, in my view, is to preserve and enhance meaningful appellate review of the correctness of the decision (which embraces both errors of law and palpable overriding errors of fact). If deficiencies in the reasons do not,

> in a particular case, foreclose meaningful appellate review, but allow for its full exercise, the deficiency will not justify intervention under s. 686 of the Criminal Code. That provision limits the power of the appellate court to intervene to situations where it is of the opinion that (i) the verdict is unreasonable, (ii) the judgment is vitiated by an error of law and it cannot be said that no substantial wrong or miscarriage of justice has occurred, or (iii) on any ground where there has been a miscarriage of justice.
>
> 26 The appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself.
>
> . . .
>
> 28 It is neither necessary nor appropriate to limit circumstances in which an appellate court may consider itself unable to exercise appellate review in a meaningful way. The mandate of the appellate court is to determine the correctness of the trial decision, and a functional test requires that the trial judge's reasons be sufficient for that purpose. The appeal court itself is in the best position to make that determination. The threshold is clearly reached, as here, where the appeal court considers itself unable to determine whether the decision is vitiated by error. Relevant factors in this case are that (i) there are significant inconsistencies or conflicts in the evidence which are not addressed in the reasons for judgment, (ii) the confused and contradictory evidence relates to a key issue on the appeal, and (iii) the record does not otherwise explain the trial judge's decision in a satisfactory manner. Other cases, of course, will present different factors. The simple underlying rule is that if, in the opinion of the appeal court, the deficiencies in the reasons prevent meaningful appellate review of the correctness of the decision, then an error of law has been committed.

[54] In the companion case, *R. v. Braich*, [2002] 1 S.C.R. 903, Justice Binnie for the Court said:

> 31 The general principle affirmed in *Sheppard* is that "the effort to establish the absence or inadequacy of reasons as a freestanding ground of appeal should be rejected. A more contextual approach is required. The appellant must show not only that there is a deficiency in the reasons, but that this deficiency has occasioned prejudice to the exercise of his or her legal right to an appeal in a criminal case" (para. 33). The test, in other words, is whether the reasons adequately perform *the function* for which they are required, namely to allow the appeal court to review the correctness of the trial decision.

[55] It is essential to maintain this perspective –are the reasons sufficient to allow the Court of Appeal meaningfully to consider Mr. Abourached's grounds of appeal? The appeal court's reasons analysis should not swerve into a free standing substantive ground of appeal. In *Braich*, Justice Binnie continued:

> 39 McEachern C.J.B.C. considered that the "frailties" of the identification evidence should not only be mentioned but analysed. I agree, but I conclude, with respect, that the analysis here was sufficient to satisfy the functional requirements of the parties and for appellate review. The issue of identification turned on the credibility of eyewitnesses who knew the suspects. The trial judge had to weigh those factors against the possibility that their evidence may have been tainted. The trial judge does not have to exhibit the novelist's touch for character delineation and motivation. The respondents launched a massive attack on the credibility of their accusers. The trial judge acknowledged the attack and, giving reasons, rejected it. The appellate court was not precluded by inadequate reasons from discharging its review function. The majority judgment simply took the view that if the trial judge had thought harder about the problems and written a more extensive analysis, he might have reached a different conclusion. In a word, McEachern C.J.B.C. considered the conviction "unsafe" but, with respect, his conclusion was driven more by the peculiarities of the facts than the alleged inadequacies of the trial reasons. A lurking doubt about an "unsafe" verdict is not sufficient to justify appellate intervention: *R. v. Biniaris*, [2000] 1 S.C.R. 381, 2000 SCC 15, at paras. 36-38. . . .
>
> 40 The respondents were entitled to a set of reasons that permitted meaningful appellate review of the correctness of the trial judge's reasons and that is what they got.
>
> 41 This is not a case of boilerplate reasons or a generic "one size fits all" judicial disposition as was found in *Sheppard*, *supra*, released concurrently. The trial judge's decision was perfectly intelligible to the respondents, even though they considered it to be erroneous. It was also clear to the British Columbia Court of Appeal. "Inadequate reasons" is not an all-purpose ground of appeal that can serve to mask what is in fact a disagreement between the trial judge and a majority of members of the appeal court on an issue which the law allocates to the trial court for decision.

To similar effect: *Gagnon* ¶ 16; *R. v. Chittick*, 2004 NSCA 135 at ¶ 32; *Creager v. Provincial Dental Board*, 2005 NSCA 9, at ¶ 106.

[56] Further, in a clear case, the appeal court may resolve a deficiency in reasons by its own analysis, without a new trial. The court may maintain the conviction

under s. 686(1)(b)(iii) of the *Code*: *Sheppard*, at ¶ 55 (10); *Braich*, item #10 at ¶ 41-42; *Lake*, at ¶ 29, and authorities there cited; *R. v. Binnington (C.S.)* (2005), 237 N.S.R. (2d) 334, 2005 NSCA 133, at ¶ 21.

[57] The *Sheppard*/*Braich* principles do not impugn Mr. Abourached's obstruction conviction. Justice Binnie's comment in ¶ 40-41 of *Braich* is apposite. The trial judge accepted Ms. Al-Shaghay's testimony and found corroboration in a reasonable interpretation of Mr. Abourached's police statement. Mr. Abourached disagrees, but the trial judge's reasoning path is clear, and did not prejudice the analysis of Mr. Abourached's substantive grounds of appeal that were discussed earlier.

[58] I have a different view, however, respecting the August 25 assault conviction. The notion of Ms. Al-Shaghay's proclivity for self harm as a retaliatory tactic was not just loose sophistry. It was the basis of the trial judge's acquittal for the alleged assault on August 28. A number of similar circumstances surrounded the event of August 25. Ms. Al-Shaghay alleged an assault, denied by every other witness in the apartment. Those witnesses did not see bruises on August 25. The only item the trial judge accepted as corroboration was the testimony of Ms. Little who said Ms. Al-Shaghay showed her the bruises one or two days later.

[59] Could Ms. Al-Shaghay have caused the bruises after August 25, before showing them to Ms. Little? Given the trial judge's reason for acquitting on the August 28 charge, this is a reasonable question.

[60] Mr. Abourached has appealed on the ground that the assault conviction is unreasonable because it is inconsistent with the trial judge's reasons for the August 28 assault acquittal. He is entitled to have that ground of appeal properly analysed by the Court of Appeal. I have discussed earlier (¶ 50-51) my view that the trial judge's insufficient reasons handicap a proper review of Mr. Abourached's ground of appeal.

[61] This is not a clear case where the Court of Appeal can examine the transcript and supply the missing reasons, as posited in *Braich* item #10 (¶ 41-42). This point depends on reasonable doubt drawn from an inference, a function for which a trial judge is better suited than an appeal court.

[62] In my respectful view, the deficiency in the trial judge's reasons can only be cured by a new trial on the assault charge for August 25.

Conclusion

[63] I would allow the appeal from the conviction for assault causing bodily harm related to August 25, 2005, on the ground that the trial judge's reasons were insufficient and this prejudiced Mr. Abourached's ability effectively to appeal that conviction. I would order that the Crown may, in its discretion, initiate a new trial on that charge. In all other respects I would dismiss the appeal.

[64] The trial judge sentenced Mr. Abourached to six months incarceration for the obstruction conviction and two year's suspended sentence for the other three convictions, the assault and the two breaches of recognizance. The trial judge's reasons do not say how the two year suspended sentence is allocated among these three other convictions. Having set aside the assault conviction, in my view the sentence for the two breaches of recognizance should total one year suspended sentence with probation, subject to the remaining conditions that were ordered by the trial judge.

Fichaud, J.A.

Concurred in:

MacDonald, C.J.N.S.

Bateman, J.A.